



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2004

Mr. John A. Kazen
Kazen, Meurer & Perez
P. O. Box 6237
Laredo, Texas 78040

OR2004-5064

Dear Mr. Kazen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204307.

The Laredo Independent School District (the "district"), which you represent, received a request for information regarding the requestor's son. You claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Initially, we note that the district only submitted for our review two documents from the Texas Department of Protective and Regulatory Services, now known as the Texas Department of Family and Protective Services (the "DFPS").¹ We, therefore, presume that the district has already provided the requestor with all other information that is responsive to the request for information to the extent that it existed on the date that the district received this request. If not, then the district must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

¹ *See* Act of June 2, 2003, 78th Leg., R.S., ch. 198, § 1.27, 2003 Tex. Sess. Law Serv. 611, 641 ("A reference in law to the Department of Protective and Regulatory Service means the[DFPS].").

We note that the Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). The submitted information is both related to a student and maintained by the district and is, thus, subject to FERPA.

Under FERPA, an education agency or institution is generally required to provide parents of minor students access to the student's education records. *See id.* § 1232g(a)(1)(B). Thus, in this case, the requestor, as a parent of the student whose education records are requested, would generally have a right to the requested information under FERPA. Similarly, section 26.004 of the Education Code provides that "[a] parent is entitled to access to all written records of a school district concerning the parent's child, including ... counseling records[.]" Educ. Code § 26.004. Thus, the requestor would normally have a right to the requested information under section 26.004.

We note, however, that the submitted information is also subject to the federal Child Abuse Prevention and Treatment Act ("CAPTA"). CAPTA conditions federal grant funding for state child abuse prevention and treatment programs on the fulfillment of certain eligibility criteria and requires states to adopt methods to preserve the confidentiality of information concerning child abuse and neglect. *See* 42 U.S.C. § 5106a(b)(1)(A), § 5106a(b)(2)(A)(viii). In accordance with CAPTA, section 261.201(a)(2) of the Family Code makes confidential "the files, reports, records, communications, and working papers used or developed in an investigation under [chapter 261] or in providing services as a result of an investigation." Fam. Code § 261.201(a)(2). The DFPS is an agency authorized to conduct an investigation in a school under chapter 261.² *See id.* §§ 261.103, .406. Because the submitted documents constitute communications developed in an investigation under chapter 261, they are confidential under section 261.201(a)(2) of the Family Code.

Thus, we are presented with a conflict of laws vis-à-vis a parent's right of access to the education record of his or her child when that record is also a communication developed in an investigation under chapter 261. In this regard, we defer to the decision of the Family Compliance Office ("compliance office") of the United States Department of Education, the office responsible for interpreting and construing FERPA, to resolve this conflict. The compliance office has found that the Texas statute was promulgated pursuant to CAPTA and

²We note, however, that if the DFPS has created a file on this alleged abuse, the child's parent(s) may have the statutory right to review that file. *See* Fam. Code § 261.201(g).

that any statutory conflict would, thus, be between the two federal statutes rather than the Texas statute and FERPA. As the two federal statutes were in irreconcilable conflict, the compliance office concluded that CAPTA governs, being the later enacted statute. *See* Letter from Leroy S. Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, to Stacy Ferguson, Attorney, Schulman, Walheim & Heidelberg (Oct. 10, 1997); *see also* *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Thus, the compliance office concluded that the CAPTA-compliant Texas Family Code provision concerning reporting suspected incidents of abuse or neglect prevailed over FERPA. We agree with the compliance office's ruling that CAPTA prevails over FERPA.

We note that there also exists a potential conflict between section 26.004 of the Education Code and chapter 261 of the Family Code. However, because chapter 261 was enacted pursuant to CAPTA, we conclude that any statutory conflict would actually be between CAPTA and section 26.004, rather than between the two Texas statutes. Such conflicts are governed by the Supremacy Clause, which provides that the laws of the United States "shall be the supreme Law of the Land [,] . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law that conflicts with federal law is preempted and "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing *M'Culloch v. Maryland*, 17 U.S. 316 (1819)). Therefore, we find in this instance that CAPTA also prevails over section 26.004. Consequently, under Texas law enacted in accordance with CAPTA, the submitted information is made confidential by section 261.201(a)(2) of the Family Code. Because section 552.101 of the Government Code excepts from disclosure information considered to be confidential by other statutes, we conclude that the submitted information must be withheld from the requestor on that basis.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

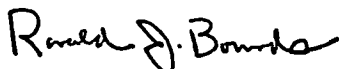
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 204307

Enc. Submitted documents

c: Mr. Fabian Ivan Villarreal
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(w/o enclosures)